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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 325

JOSEPH BACINO, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	18
Appendix	1a

CITATIONS

CASES:

Avery v. Georgia, 345 U.S. 559 (1953)	16
Baker v. Hudspeth, 129 F. 2d 779 (10th Cir. 1942)	17
Beck v. Washington, 365 U.S. 866 (1961)	6
Bruno v. U.S., 308 U.S. 287 (1939)	17
Cassell v. Texas, 339 U.S. 282 (1950)	16
Gideon v. Wainwright, 31 Law Wk. 4291 (1963)	6
Gori v. U.S., 367 U.S. 364 (1961)	6
Hockaday v. Red Line, Inc., 174 F. 2d 154, 156 (D.C. Cir. 1949)	12
Irvin v. Dowd, 366 U.S. 717 (1961)	6
King-Size Publications, Inc. v. American News Co., 194 F. Supp. 109 (D.N.J. 1961)	7
McNabb v. U.S., 318 U.S. 332 (1959)	17
Marsh v. Illinois Central R. Co., 175 F. 2d 498 (5th Cir. 1949)	15
Marshal v. U.S., 360 U.S. 310 (1959)	17
Mattox v. U.S., 146 U.S. 140 (1892)	11
New York Central RR Co. v. Johnson, 279 U.S. 310 (1929)	12
Re Murchison, 349 U.S. 133 (1955)	7
Re Oliver, 333 U.S. 257 (1947)	7
Patton v. U.S., 281 U.S. 276 (1930)	5
Reynolds v. U.S., 98 U.S. 145 (1878)	7

Page

Rubenstein v. U.S., 227 F. 2d 638 (10th Cir. 1955) 12
Ryan v. U.S., 191 F. 2d 779 (D.C. Cir. 1951) 10
Tumey v. Ohio, 273 U.S. 510 (1926) 7
Union Pacific R. Co. v. Field, 137 F. 14, 15 12
United States v. Flynn, 216 F. 2d 354 (2d Cir. 1954) .. 9
United States v. Fries, 3 Dall. 515 (1799) 7
United States v. Milanovich, 303 F. 2d 626 (4th Cir. 1962) 12
United States v. Puff, 211 F. 2d 171 (2d Cir. 1954) 11
United States v. Sorcey, 151 F. 2d 899 (7th Cir. 1945) .. 12
United States v. Wood, 299 U.S. 123 (1936) 7
Wheaton v. U.S., 133 F. 2d 522 (8th Cir. 1943) 10

MISCELLANEOUS:

Am. Jur. 11
Co. Litt. 7
Maitland, A Constitutional History of England 5
Moore, Fed. Practice & Procedure 16

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Petitioner, Joseph Bacino, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on April 15, 1963.

CITATION TO OPINION BELOW

The opinion of the Tenth Circuit appears at 316 F.2d 11 and is printed here in the Appendix, *infra*, p. 1a.

JURISDICTION

The judgment of the Tenth Circuit was entered on *April 15, 1963*. R. 3. Rehearing was denied on *May 6, 1963*. See R. 1-6.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

If during the trial of a Federal criminal case one of the jurors makes comments to a third party about the case, his words on their face suggesting personal bias or prejudice, and the defendant's counsel, when alerted to the exchange, moves for a mistrial:

1. Do the dictates of Due Process impose upon the Trial Judge a duty of conducting a full hearing on the question of the exchange and possible bias, including sworn and reported testimony, in the presence of counsel?

2. Regardless of Constitutional considerations, should this Court, in the exercise of its supervisory powers over lower Federal courts, either order a new trial or remand this case for a full hearing on the possible bias of the juror in question?

STATUTE INVOLVED

There are no statutory provisions involved in this case. It can involve, however, the Sixth Amendment and the due process clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Joseph Bacino was tried on two separate indictments for unlawful transfer of marijuana, under 26 U.S.C. 4742(a), in the United States District Court for the District of Colorado. The jury returned a verdict of guilty on both charges.

After the conclusion of the prosecution's case in chief the trial judge summoned counsel for both sides to his chambers. There he disclosed that he had previously, unbeknown to the attorneys, conferred privately with

one of the jurors sitting in the case. He had done this, he explained, because the juror, a Mr. Slader, was said to have spoken to "one of the people in the Clerk's office," a Mr. Pease, and also to a Mr. Rogers. Mr. Rogers, apparently also a court employee, attended the *in camera* discussion with the attorneys. The record does not reflect the presence of Mr. Pease.

At the conference with counsel the Judge paraphrased the earlier exchange between the juror and his auditors in these words:

> ". . . the substance of his conversation was this: How come this fellow, referring to the Defendant, is out on Bond. He gave me a dirty look as I came in the building this morning." (R 1-53)

When asked by the Judge what it was Slader had said to him, Mr. Rogers replied:

> "Something about, we are going to have to do something about this Bacino, and I didn't say anything and he said do you know why he is out on Bond and I didn't say anything. He said he was down there with three other guys . . . ." (R 1-53)

The Judge's interrogation of the juror had not been recorded or under oath. Nor was there ever any confrontation on this matter between defendant, his counsel and the juror, any hearing, any reported testimony by the juror, or any cross examination of him.

Upon being apprised of the juror's asserted pronouncements about the case to third parties, and the Judge's earlier private conference with the juror, the defendant's counsel moved in chambers for a mistrial. He predicated his motion upon the Judge's rehearsal of the earlier exchange and his paraphrase of the juror's remarks. After a brief colloquy the Judge denied the motion, with leave to renew it later.

Thereupon, the case resumed its course. The defendant offered his defense. When he had concluded, the defendant's counsel renewed his motion for a mistrial. The Judge again overruled it, noting, however, that,

> "[i]t is of course possible that prejudice will loom up and show itself and of course the Court is open minded. At such times as it does appear that the Defendant has been prejudiced in some way . . . why appropriate relief will be granted on the basis of such a showing." (R 1-64)

After the verdicts were returned defense counsel moved in timely fashion for a new trial on the ground, *inter alia*, that "the court erred in not granting defendant's motion for a mistrial by reason of the act of one of the jurors." (R 1-5) This motion was also denied.

On appeal, the Court of Appeals for the 10th Circuit affirmed the judgment. The defendant assigned as error the trial judge's *ex parte* interrogation and admonition of the juror, Slader. He further contended that the juror's statements about the case disclosed personal bias or prejudice on the juror's part. As to the latter point, the 10th Circuit stated in its opinion:

> "Appellant places much reliance on the juror's phrase that 'something must be done about Bacino,' and this, taken out of context, does sound bad and almost any meaning can be attributed to it. However, as indicated above it was used when the juror asked why appellant was out on bond, and when he was under the impression that appellant was in custody. Thus 'something sould be done about Bacino' being able to sit on the courthouse steps and talk with his friends while he was being tried." (App. p. 6a)

The Court added:

> "On this matter of possible prejudice, appellant's attorney did nothing to develop the matter with the officials from the clerk's office during the discussion with the judge. Nor did he at any time request any investigation of the matter nor an examination of the juror." (App. p. 6a)

From this decision the present petition for certiorari is taken.

REASONS FOR GRANTING THE WRIT

I.

Perhaps the brightest thread in the seamless web of Anglo-American law has been its long and firm preoccupation with the concept of a fair trial to which all criminal defendants are entitled. The notion of a fair criminal trial evolved by painful stages through English judicial history. See, *e.g.*, Maitland, The Constitutional History of England 212-213 *passim*. Erected upon the corpus of the past, *cf. Patton* v. *U.S.*, 281 U.S. 276 (1930), and delineated with the peculiar genius of its formulators, the American standard of a fair criminal trial is incarnated in the fundamental law of the land. The Sixth Amendment to the Constitution secures to the accused "the right to a speedy and public trial, by an impartial jury . . . ." Overlapping this guaranty is the general protection afforded by the Fifth Amendment against the deprivation of life, liberty or property without due process of law. U.S. Const., Amend. V.

From a relatively simple factual base there arises in the case at bar a question of legal standards that is of considerable gravity, subject to resolution by the

reach of the foregoing Amendments, or of this Court's supervisory power over lower federal courts.

In the past this Court has not stinted in the time and attention it has devoted to the implementation of the legal standards of fair criminal trials. E.g., *Gideon* v. *Wainright*, 31 Law Wk. 4291 (1963); *Gori* v. *U.S.*, 367 U.S. 364 (1961); *Beck* v. *Washington*, 365 U.S. 866 (1961); *Irvin* v. *Dowd*, 366 U.S. 717 (1961). The present case is another in a series of cases tendering to this Court an opportunity for further refinement of the great organic concepts of "due process" and "a fair trial." Review by certiorari is warranted because of the inherent significance of the issues raised.

At its broadest, the question posed is whether the trial court below erred in failing to allow the defendant a full hearing on the issue of a juror's possible bias, once the juror's spontaneous and seemingly deprecating remarks about the defendant had come to light. By a "full hearing" we mean a reported session in which pertinent testimony was taken under oath and the defendant's counsel allowed to interrogate the juror, either directly or through the trial judge.

This broad question, which speaks of mere "error," is obviously cast in terms of the trial judge's exercise of discretion. Another formulation of similar breadth might be whether the trial judge reversibly erred in concluding that there had been no showing of prejudice to the defendant on the basis of the juror's utterances. But such broad issues are not the object of this petition.

II

Framed more narrowly, a question arises of a wholly different order. As Justice Clark observed for a unanimous Court in *Irvin* v. *Dowd*, *supra*, "[i]n

essence, the right to jury trial [of the Sixth Amendment] guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." 366 U.S. at 722. See also *Reynolds* v. *U. S.*, 98 U.S. 145, (1878) ("By the Constitution of the United States (Amend. VI.), the accused was entitled to a trial by an impartial jury") "A fair trial in a fair tribunal" is also an essential element of due process of law, *Re Murchison*, 349 U.S. 133, 136 (1955); *cf.* also *Re Oliver*, 333 U.S. 257 (1947); *Tumey* v. *Ohio*, 273 U.S. 510 (1926); *United States* v. *Fries*, 3 Dall. 515 (1799). The relationship between a fair trial and the impartiality of individual jurors was succinctly summarized in *King-Size Publications, Inc.* v. *American News Co.*, 194 F. Supp. 109, 110 (D.N.J. 1961) in this fashion:

> "It is universally recognized, and courts of all jurisdictions have determined, that in criminal cases a fair and impartial jury is an essential element of every trial. And that means that *every* juror must be of the type qualifying as fair and impartial. Time after time courts have stressed the indefectibility of this requirement." (Emphasis in original)

To be impartial a juror must be free of bias or prejudice against the accused. He must, in Lord Coke's classic phrase, "be indifferent as he stands unsworn." Co. Litt., 155b. In an equally classic pronouncement, Chief Justice Hughes pointed out that "[i]mpartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States* v. *Wood*, 299 U.S. 123, 145-146 (1936)

The former Chief Justice's last sentence is particularly apposite because it leads on to the Constitutional question which fairly arises here.

It is scarcely contestable that the juror's remarks about the defendant below betrayed a measure of bias against him. The surface content of the language used, without more, indicated at least some degree of antipathy toward the accused. Neither the trial judge nor the Court of Appeals disputes this. The latter conceded in its opinion that some of the language, as paraphrased in the record, "sounds bad and almost any meaning can be attributed to it." (App. 6a). With the defendant's motion for mistrial, based on the juror's remarks, the fair trial contemplated by the Sixth Amendment was thus called into question. The precise Constitutional issue then becomes: at this point did the dictates of due process *require* the trial judge to conduct a full hearing on the matter, so as to be able to make an intelligent, definitive adjudication whether the juror was in fact biased? Unless federal procedure is "chained to [an] ancient and artificial formula," it would appear that defense counsel's motion for mistrial should have sufficed to trigger such a full scale inquiry. Absent such a hearing, as it happened, the case hurried on its rather predictable course. The intimation of bias, a *prima facia* assault upon the defendant's irrefragable right to a trial by twelve impartial jurors, was never factually explored and resolved one way or the other. The facts or deliberative processes, such as they might have been, that compelled the trial judge to deny the motion for mistrial and find "no prejudice" are not reported. The exact words uttered by the juror are not reported. The juror's explanation of his own motives in making the

statements was never elicited. Much less was he ever subjected to careful examination by Judge or attorney as to the meaning and self-revelation to be found in his words.

The chance to affirm or deny on factual grounds the taint upon the trial below was irretrievably lost because there was no hearing; and the petitioner's cause before this Court rests in large measure upon the very barrenness of the record itself.

III.

Without foreshadowing an argument on the merits, petitioner suggests that the course pursued by the trial court was not merely erroneous but a deprivation of due process. Certainly the Judge's failure to conduct a hearing on his own motion was not the normal procedure followed in cases where facts casting doubt upon the jury's total impartiality come to light in the course of trial. In *United States* v. *Flynn*, 216 F. 2d 354 (2d Cir. 1954), the Second Circuit reviewed a case in which, among other things, an individual juror was discovered *in medias res* to have commented about the case to third parties. Her comments were more generalized and more innocuous than those attributed to the juror in the instant case. Her words betrayed no particular animus against the accused. The case was a Smith Act prosecution and her remarks concerned the nature of "Marxist doctrine" as gleaned by her in the course of the trial. Upon learning of the transaction in question the trial judge conducted an investigation, under oath, in which counsel were allowed to examine all participants, including the juror (through the Judge), and all testimony was stenographically reported. Present and subject to interrogation were

both the juror and all of her auditors. On the basis of the evidence elicited at the hearing the Judge was quite doubtful whether the juror had actually uttered the words imputed to her by the third party. Nevertheless, the Judge excused the juror, observing that ". . . where a juror does communicate with others about the case, the presumption is that there has been some prejudice . . ." *Id.* at 370-371 The appellate court approved his decision.

In *Ryan* v. *U.S.*, 191 F. 2d 779 (D.C. Cir. 1951), Judge Pine of the District of Columbia had been faced with the problem of verbal exchanges between the prosecuting attorney and certain jurors, during the course of a robbery trial. Though seemingly "bantering exchanges," at least in their inception, Judge Pine conducted an exhaustive hearing on the defendant's motion for a new trial. Several jurors and other witnesses were examined and cross-examined. Of this the reviewing court said "[t]he trial court adopted the appropriate procedure of probing the matter by an extensive hearing." *Id.* at 781, and applauded the "great care" exercised by the Judge in "permitting the development of the evidence and in considering it in the context of the trial . . ." *Id.* at 782

One of the clearest statements of the trial judge's obligation to ventilate fully all issues arising from a questionable exchange between a juror and third parties is found in *Wheaton* v. *U.S.*, 133 F. 2d 522 (8th Cir. 1943). There the jury returned a verdict of guilty after a trial on an 11-count mail fraud indictment. The defendant moved for a new trial solely on the strength of alleged communications between the bailiff and some jurors during the jury's deliberations. The trial judge overruled the motion without a hearing or

trial of the issues raised by the motion and the prosecution's opposing affidavits. The Eighth Circuit reversed, holding that where a motion such as this ". . . cast[s] suspicion upon the fairness of the trial" the issues thereby raised must be "competently tried." Not having been adequately tried, the case had to be reversed with an order directing the judge to "rehear the appellant's motion, and, after a rehearing, to determine whether a new trial should be granted . . ." *Id.* at 527.

Once a juror is shown to have improperly communicated about the trial to a third party, thus casting a shadow upon "the fundamental theory that the American jury should be composed of impartial jurors . . ." *United States* v. *Puff*, 211 F. 2d 171, 184-185 (2d Cir. 1954), due process would appear to compel a hearing, as probing as the particular factual circumstances might require, on the judge's own motion. See, *e.g.*, 53 *Am. Jur.* 685 ("To authorize the discharge of a juror in a criminal case by reason of an occurrence not in open court in the immediate presence of the judge, there must be . . . a judicial inquiry and a finding and determination of the existence of the necessity.") Such a proposition is but a correlative to this Court's clear and often-cited pronouncement in *Mattox* v. *U.S.*, 146 U.S. 140, 149 (1892):

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

How can the "harmlessness" of the communications be "made to appear" without a hearing? How can the

critical and dispositive question of a juror's "impartiality" be determined without an elaboration on the record of the circumstances surrounding his communication, the recollection of his exact words, some explanation by him of why he said them, some plumbing of his motives by the Court? How, in short, can there by an meaningful adjudication of the ultimate issue of impartiality without a development of the underlying facts? Notice of the communication should suffice in and of itself to compel a careful gathering and scrutiny of the pertinent details on the Court's own motion.

If the Sixth Amendment right to an impartial trial is *prima facie* imperiled by a juror's improper communication, there devolves upon the trial judge a duty of marshalling all the relevant facts and evidence necessary to determine whether the juror is in fact impartial. After notice of the communication, due process should be satisfied with nothing less. At least so it could be argued. *Cf. New York Central RR Co.* v. *Johnson*, 279 U.S. 310, 318 (1929); *Hockaday* v. *Red Line, Inc.*, 174 F. 2d 154, 156 (D.C. Cir. 1949); *United States* v. *Sorcey*, 151 F. 2d 899 (7th Cir. 1945). After all, the court itself is under an overall obligation ". . . to assure to the litigants a fair and impartial trial." *Union Pac. R. Co.* v. *Field*, 137 F. 14, 15.

In any event, a motion for a mistrial should unquestionably be enough to precipitate a hearing. *Cf. Rubenstein* v. *U.S.*, 227 F. 2d 638 (10th Cir. 1955); *United States* v. *Milanovich*, 303 F. 2d 626, 629 (4th Cir. 1962). Yet the answer given by the 10th Circuit to this problem evidently requires more than this. Though the defense counsel below made a motion, the court's opinion faults the counsel for not doing more—for failing to make an affirmative "request" for an "investigation of the matter" or an "examination of

the juror." (App. p. 6a) This language smacks of some sort of waiver concept. The 10th Circuit apparently is of the view that the defense counsel waived any right he may have had to a full hearing on the question whether the Sixth Amendment right of the accused had been effectively jeopardized, by standing on his motion for mistrial without spelling out a request for an "investigation."

Petitioner is aware of no legal principle which sustains the position taken by the 10th Circuit, nor did it disclose any authorities in its opinion. Just as the Constitutional right to trial by an impartial jury is not waivable, so also, in our view, should be the right to a full hearing, adequate to decide whether a questionable juror is or is not impartial. This seems particularly sound in light of the presumption of prejudice which attaches to improper communications by a juror. So far as we are aware, however, the precise question here under discussion has never been decided by this Court.

IV.

Presumably the 10th Circuit would concede that the existence of bias or prejudice on the part of the juror below would have vitiated the trial because it would then have been a trial before something other than the totally impartial jury contemplated by the Sixth Amendment. In addition to its justification of "waiver," therefore, the 10th Circuit was also at pains to explain away the juror's communication, and thus to find "no prejudice" on the record. Its effort appears at page 10 of its opinion, reproduced herein at App. 6a. Working with a meagre and unilluminating record the 10th Circuit is nevertheless able to conclude that the phrase "something must be done about

Bacino", though conceivably "bad" in the abstract, actually implied no animus against the accused when put in proper perspective. The true purport of the phrase, says the court, was nothing more than a presumably friendly, or at least neutral, admonition that something ought to be done about that Bacino "being able to sit on the courthouse steps and talk with his friends while he was being tried."

The futility of the court's attempt to negate the possibility of "prejudice" is overwhelming. It analyzed only one phrase. How many others were uttered by the juror neither the court nor anyone else can know. The court's *ex post facto* parsing of the record's niggardly contents was methodologically unsound. But the chief flaw in the court's reasoning is its tacit assumption that its own hypothesis as to the juror's factual neutrality is entitled to any probative weight. It is not. The court's transmutation of "something should be done about Bacino" into "something should be done about Bacino being able to sit on the courthouse steps and talk with his friends while being tried" proves exactly nothing. If the juror in substance stated either of the quoted phrases the question of transcendent importance is not as much exactly what words he employed as *why* and in what spirit he said what he did. The court's own version of the transaction is just as compatible with a personal bias against the juror as the phrase considered in the "abstract." What difference should it make to a truly disinterested juror whether the accused is on bond and able to talk with his friends during his trial? Does a "neutral" juror normally seek out a court official during recess and gratuitously inquire why the defendant is not in custody? The difficulty, of course, is that neither the trial court nor the appellate court had the benefit of a

full fledged hearing, the only logically satisfactory means of judging the issue of prejudice or impartiality. Both dealt with the problem in the "abstract." And both, in our view, decided it without adequate groundwork.*

The 10th Circuit might, not improbably, have been influenced toward its affirmance by the rather common-

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* Furthermore, if one is inclined to pass on the issue of "prejudice" from the bare record alone, very persuasive arguments can be made that the trial judge's exercise of discretion was unsound. One, for example, derives from certain observations which he volunteered to counsel toward the close of the colloquy in which he informed them of his earlier discussion with the juror. He said:

> "THE COURT: He should not have been at that entrance. This is extremely bad. He shouldn't have been there. This is extremely bad, this business of looking at the jurors. I have been through it many, many, times when I was at the District Attorney's office and it is a practice I don't like and it has a diabolical effect. They lurk in the halls and wait for them to go out for lunch and stand and look for them to come back from lunch. It is not good and I wish you had instructed him when he comes to and from this Court Room to come up here and get in a position where he is not exposed to the Jury." (R. 1-54)

The argument is simply that such gratuitous remarks suggest that the Judge was not properly attuned to the matter before him. He was not at that moment sitting for the purpose of insuring the personal comfort or serenity of the jury. He was, or should have been, engaged in deciding whether the *defendant's* constitutional right to a fair and impartial trial had been effectively jeopardized. The emphasis of his quoted words accordingly appears to be unnatural and improper. One fair inference to be drawn from them is that the Judge was not adequately oriented to the significance of the issue confronting him; that he decided it in haste without the benefit of his full "discretion." See, *e.g.*, Marsh v. Illinois Central R. Co., 175 F. 2d 498, 500 (5th Cir. 1949).

This and other arguments can be made against the conclusion of "no prejudice," quite apart from the more important question arising from the lack of a full hearing. Since such arguments are not the central focus of this petition, however, they are not developed here.

place character of the prosecution as a whole. Concededly, the case was not an unusual one. But for the lone question raised by the juror's communications it might even be classified, not too uncharitably, as run of the mine litigation. Under such circumstances a reviewing court's impulse to let the question of a juror's impartiality rest with the discretion of the trial judge, as this one ultimately did, might be altogether understandable. But to understand in this case is not necessarily to forgive. To mark this decision off as an unreversable exercise of "discretion" would be a serious elision of principle. The question is not whether the judge abused his discretion, but whether there was sufficient factual basis upon which to exercise any discretion at all. If from the communications which came to light in this case there devolved upon the judge a duty to ferret out all relevant facts through a full hearing, it is no answer to quote the familiar doctrine that a trial judge generally enjoys a large range of discretion in retaining or excusing jurors accused of bias. The threshold issue is whether the trial as it stands—riddled with factual *lacunae* on the critical problem of possible bias—was a fair trial. If not, the defect is not curable by the ordinariness of the litigation, the "discretion" of the trial judge, see 6 Moore, Fed. Practice & Procedure 3801, or even the evidence of guilt that may repose within the record, see *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Cassell* v. *Texas*, 339 U.S. 282 (1950).

It is this threshold problem that the petitioner now brings before this Court. It is an open question. This Court could adopt a clear, simple and salutary rule to the effect that once a juror improperly communicates with third parties in words on their face suggestive of bias, and defense counsel accordingly moves for a mis-

trial, the trial judge is obligated to conduct a hearing on the matter, reported and under oath, of an intensity commensurate with the likelihood of bias implied by the communication itself. The Court could formulate such a principle either in terms of Constitutional law or within its "supervisory powers to formulate and apply proper standards for enforcement of the criminal law in the federal courts." *Marshal* v. *U.S.*, 360 U.S. 310, (1959); *cf. McNabb* v. *U.S.*, 318 U.S. 332 (1943); *Bruno* v. *U.S.*, 308 U.S. 287 (1939).

Some 20 years ago the 10th Circuit accurately summarized the law in these words:

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment . . . is also a denial of due process, demanded by the 5th . . . and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void . . ." *Baker* v. *Hudspeth*, 129 F. 2d 779, 781 (10th Cir. 1942)

In the instant decision the 10th Circuit failed to implement the legal standard it so ably describes above. Your petitioner, whether guilty or not, has been denied a fair trial in the federal courts. He looks, as he must, to this ultimate tribunal for his only means of judicial redress. The question offered by this case is, in your petitioner's view, of sufficient import to warrant this Court's attention.

CONCLUSION

Wherefore, the petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

JOSEPH BACINO, *Appellant*,

v.

UNITED STATES OF AMERICA,
Appellee (two cases).

Nos. 7193, 7194.

United States Court of Appeals
Tenth Circuit.

April 15, 1963.

Rehearing Denied May 6, 1963.

V. G. Seavy, Pueblo, Colo. (Seavy & Seavy, Pueblo, Colo., on the brief), for appellant.

Lawrence M. Henry, U. S. Atty. (Michael C. Villano, Asst. U. S. Atty., on the brief), for appellee.

Before MURRAH, Chief Judge, and BREITENSTEIN and SETH, Circuit Judges.

SETH, Circuit Judge.

The appellant was indicted in two separate indictments, each containing one count charging him with the unlawful transfer and sale of marihuana in violation of Title 26 U.S.C. § 4742(a). The cases were consolidated for trial, the jury found the appellant guilty in both cases, and he appeals.

Appellant urges that the court erred in not sustaining his motion for a mistrial; that the evidence was insufficient to support the verdict; that appellant's motion for directed verdict at the conclusion of the Government's case and the entire case should have been granted; that the verdicts are not supported by the evidence, are contrary to law, and contrary to the instructions.

The first point considered is the refusal of the trial court to grant a motion for mistrial. Such a motion is directed to the discretion of the trial judge and whether it should have been granted depends on all the circumstances. Marshall v. United States, 258 F.2d 54 (10th Cir.), rev. on other grounds, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250). The motion here was based on an incident involving one of the jurors. After the trial had started, and after the Government had rested, but before appellant began his defense, one of the jurors saw the appellant with several men in the courthouse entrance. This occurred as the juror was entering the building to attend a morning session of this trial. The juror then went to the office of the clerk of the court and made several statements to the men in the office. These court officials reported the incident to the judge and he called in the juror to interview him. During this interview no one was present other than the judge and the juror. Following this the judge called the attorneys into his chambers to tell them about the incident and to let them know what he had done. The juror was not then present, but the two men from the clerk's office were there.

The transcript contains what was said in the discussion between the court and the attorneys when the judge reported his interview with the juror, and when Mr. Rogers, one of the clerk's staff, reported what the juror had told him. The judge told the attorneys that the substance of the statement by the juror to the men in the clerk's office was: "How come this fellow, referring to the Defendant, is out on bond? He gave me a dirty look as I came in the building this morning." The judge then said, "So, I brought Slader (the juror) in here upon the basis of that and I didn't elicit anything from him but I told him that I had admonished him three times not to talk about this case to anybody." Mr. Rogers from the clerk's office related to the attorneys that the juror had said to him, "Something about we are going to have to do something about this

Bacino, and I didn't say anything and he said do you know why he is out on Bond and I didn't say anything. He said he was down there with those other guys, downstairs now." Mr. Rogers added that he felt the juror did not realize the appellant was not in the custody of the marshal. At the outset of this discussion between the trial judge and the attorneys in chambers, the judge told the attorneys that Mr. Pease, who was one of the officials in the clerk's office, and Mr. Rogers were there, and thereby indicated they were available to the attorneys. The transcript shows that Mr. Rogers participated in the discussion. The attorney for appellant during this discussion said he thought the attitude and expression of the juror indicated he had formed "some pretty definite opinions," and in view of the juror's statement he moved for a mistrial. The motion was denied. The judge then told him that there had been problems before by reason of the presence of defendants in the hallways during the time the jurors were passing back and forth, and he asked him to see that his client was not close to places the jury used. At the conclusion of this discussion, the court was opened and the appellant proceeded with his defense.

The statements by the juror to the clerk's staff were ill-advised, but these complaints refer only to the presence of appellant at the particular place and his right to be there, *they were not statements about the case.* They did not concern any of the evidence nor any of the proof or witnesses, nor the merits, and nothing about the charge whatever, nor about any of the proceedings. There is no contention that anyone talked to the juror about the case; the record shows that the juror made the statements. The trial judge, whether he considered them as being made about the case or not, exercised his proper discretion. The fact a juror makes such statements does not make it incumbent upon the trial judge to declare a mistrial. Bullock v. United States, 265 F. 2d 683 (6th Cir.); Roberson v. United

States, 249 F. 2d 737 (5th Cir.); United States v. Flynn, 216 F. 2d 354 (2d Cir.).

The interview of the juror by the judge was a private communication with a juror to admonish him, and only this was done. Thus we have a communication to a juror about his conduct as a juror. It is apparent that the judge was concerned upon learning a juror had made statements about a defendant on trial and would wish to make sure that the juror would not talk about the case. The judge reported to the attorneys that he told the juror that the statements were about the case, and told the juror to hold his peace. We are not convinced that the statements were "about the case" in the sense that the rules relating to private communications with jurors use the term, nor within the reasons for which the rules were devised. But in any event, the record as a whole shows that the communication—the admonition—was not possibly prejudicial nor was it within the range of reasonable possibility of having affected the verdict. The admonition had been given before several times to the jury as is the accepted practice and no objection can be made to the substance of the admonition. This court in Little v. United States, 73 F. 2d 861 (10th Cir.), considered a situation where a stenographer was sent into the jury room to read to the deliberating jury the charge of the court from shorthand notes. This was held to be error and the court said that any communication between the court and the jury should be in open court. The court stressed the dangers of permitting third persons in the jury room during deliberations. Little v. United States, supra, further holds that when the entire record discloses that an error has not affected the substantial rights of the accused, it will be disregarded. However if within the range of reasonable possibility it may have affected the verdict, the accused does not have the burden of showing an adverse effect. Rice v. United States, 149 F. 2d 601 (10th Cir.); Fina v. United States, 46 F. 2d 643 (10th Cir.); Holmes v.

United States, 284 F. 2d 716 (4th Cir.). In Mattox v. United States, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917, a bailiff had discussed the case with the jury. Of this the Court said: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." This court, in Baker v. Hudspeth, 129 F. 2d 779 (10th Cir.), considered a case where complaint was made that the marshal, when the jury was put in his charge to keep together during the trial, admonished the members to abide by the restrictions put on them, to cooperate in these matters to avoid a mistrial. Of this point the court said that it was the duty of the marshal to protect the jury from outside influences and it was commendable for the marshal to admonish the jury and to ask for their cooperation as long as it did not tend to influence the jury in considering the case. No influence was noted and the trial court was affirmed. The judge has considerable discretion in the manner in which the matters here concerned are handled. Farish Co. v. Madison Distributing Co., 37 F. 2d 455 (2d Cir.).

The appellant urges that the judge's private admonition of the juror was part of the trial and that he was entitled to be present. Rule 43, Federal Rules of Criminal Procedure. It is not necessary to decide whether this admonition of the juror was part of the trial of the case or not, because in accordance with Jones v. United States, 299 F. 2d 661 (10th Cir.), Rice v. United States, 149 F. 2d 601 (10th Cir.) Little v. United States, 73 F. 2d 861 (10th Cir.), and Finn v. United States, 46 F. 2d 643 (10th Cir.), the record of itself shows that no prejudice or harm could have resulted. In Jones v. United States, supra, the trial court answered a question submitted by the jury during its deliberations and the record did not show whether the accused was present, but apparently his attorney was. The court said under such circumstances the conviction could

not stand unless the record completely negatives any reasonable possibility of prejudice arising from such error. The court found no such reasonable possibility, the question related to law and was covered by prior instructions. Here the record likewise shows no reasonable possibility of prejudice arising from the admonition. It was a repetition of prior ones and was a matter of the juror's duty as such and of the court's supervision over the jurors.

As to possible prejudice of the juror as evidenced by his statements we find that appellant's attorney during the discussion with the trial judge in chambers said the juror's statements showed he had an opinion about the case. Appellant places much reliance on the juror's phrase that, "something must be done about Bacino," and this, taken out of context, does sound bad and almost any meaning can be attributed to it. However as indicated above it was used when the juror asked why appellant was out on bond, and when he was under the impression that appellant was in custody. Thus "something should be done about Bacino" being able to sit on the courthouse steps and talk with his friends while he was being tried. On this matter of possible prejudice, appellant's attorney did nothing to develop the matter with the officials from the clerk's office during the discussion with the judge. Nor did he at any time request any investigation of the matter nor an examination of the juror. Instead after the short conference he started the defendant's case and finished the trial without any further reference to it other than at the end to renew his motion for mistrial. The trial judge had considered the matter satisfied himself there was no prejudice, and so exercised his discretion in retaining the juror. The matter of the discharge or retention of jurors under these circumstances is peculiarly within the discretion of the trial judge. United States v. Flynn, 216 F. 2d 354 (2d Cir.); Lewis v. United States, 295 F. 441 (1st Cir.).

To consider the interview of the juror by the judge in the absence of the defendant or counsel under the circumstances of this particular case and in view of the facts developed and the subject of the discussion, we do not feel that it constituted reversible error. An incident of this nature is obviously fraught with danger, but we do not have a situation here that anywhere nearly approaches that found in the Little case or the Marrow case. We must assume also that the jurors adhered to their oath. Baker v. Hudspeth, 129 F. 2d 779 (10th Cir.).

The other points raised by appellant require no extended discussion. There is substantial evidence in the record to support the court's rulings on appellant's motions for a directed verdict and to support the verdicts in both cases. The record shows that the verdicts are in accordance with the evidence and the law; that the instructions are proper and the verdict is not contrary to them. There was no error in the trial judge's refusal to grant a mistrial nor new trials.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 325

JOSEPH BACINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on April 15, 1963, and its opinion is reported at 316 F. 2d 11. A petition for rehearing was denied on May 6, 1963 (Pet. App. 1). The petition for a writ of certiorari was not filed until August 2, 1963. A petition filed 88 days after the denial of the petition for rehearing by the court of appeals in a criminal case is manifestly out of time under Rule 22-2 of the Rules of this Court.

In any event, the facts and the law relating to the issue raised in the petition—whether the trial court on its own motion should have conducted a full-dress hearing on possible bias of a juror—is fully canvassed in the opinion of the court of appeals (Pet. App. 1-7). For the reasons there stated, we believe that the conviction was properly affirmed and that the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

AUGUST 1963

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